Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

MYRNA OCHOA-CARRILLO
Petitioner

v.

ALBERTO GONZALES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Myrna Ochoa-Carrillo, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

QUESTION PRESENTED

In 2005, Congress passed the REAL ID Act of 2005, P. L. 109-13, 119 Stat. 231 (May 11, 2005) which stripped many District Courts of the jurisdiction to review orders of removal. However, REAL ID did not strip the District Court of its Habeas Corpus jurisdiction to review removal orders entered under 8 USC 1225 (b)(1)(A)(i).

This case presents the following question:

1. In light of the REAL ID Act of 2005, does a District Court retain jurisdiction to review a removal order entered under 8 USC 1225 (b)(1) after an alien has illegally re-entered the United States?

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Opinion Below

The opinion of the United States Court of Appeals for the Eight Circuit, which this Court is asked to review on certiorari, is reported.

STATEMENT OF JURISDICTION

This petition for certiorari seeks review of a decision of the United States Court of Appeals for the Eighth Circuit. Jurisdiction of this cause is provided by 28 USC §1254(1), which provides,

> Courts of appeals; certiorari; certified questions
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The Court of Appeals entered the order of which review is sought on May 1, 2006. This Petition for Certiorari is timely filed within 90 days of the denial.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be...deprived of life, liberty, or property, without due process of law."

Because this cause arises from the proceedings of federal agencies, the Department of Justice (DHS), Department of Homeland Security (DHS), the Bureau of Immigration and

Customs Enforcement (ICE) and Executive Office for Immigration Review (EOIR), its legal questions are governed by numerous statutes and regulations. Because they are lengthy, therefore, their citations are set out here, and the salient parts are copied out in the Appendix at "a."

STATEMENT OF THE CASE

The jurisdiction of the Appeals Court to review orders of removal is granted by statute, INA §242(a)(1), 8 USC §1252(a)(1).

Course of Proceedings

The proceedings that led to this Petition for Certiorari began over two years ago. The subject of this Petition is the decision of the Court of Appeals mandating transfer of the Petition for Habeas filed in the Western District of Missouri in April, 2004. Following the transfer of the case, the 8th Circuit Court of Appeals dismissed the matter. In so doing the issues underlying the Petition for Habeas were never resolved and all review was frustrated

Facts

Petitioner, is a 29 year old, married female who is a native and citizen of Mexico.

Petitioner was paroled into the United States in 1986 in order to obtain medical treatment. She was paroled in under the name Myrna Gregoria OCHOA-Carrillo and Agency no. 28 337 307 with a date of birth of May 9, 1974.

The government alleges that Petitioner attempted to again enter the United States on or about March 2, 1998 at El Paso Texas. The government further alleges that Petitioner attempted to enter the United States under the assumed name of Ivette Trevizo –Frias and that the individual made an oral claim to being a United States Citizen to gain entry into the

United States. (in violation of 8 USC 1182 (a)(6)(C) Petitioner has continually disputed these allegations.

Therefore, on March 2, 1998, the government entered a Removal Order pursuant to 8 USC 1225 (b)(1)(A)(i). The name used to issue the order was Ivette TREVIZO –Frias and the agency number assigned to the matter was "76 806 533". The date of birth listed for Ms. Trevizo was September 24, 1971.

In November 2001, Petitioner married a United States Citizen, Brady Dick. The couple then filed a Petition for Alien Relative and Application for Adjustment of Status. Petitioner was provided proper work authorization and fingerprinted in accordance with the Agency policies. Thereafter, on March 10, 2004, the couple appeared at a marriage interview. The interview went smoothly and the agency advised that they would require Petitioner to file a waiver based on her self-proclaimed use of a false social security card. The couple filed the waiver and paid the applicable fees. Thereafter, the Petition for alien relative was approved, however the waiver was denied based on the alleged 1998 false claim. Because of this denial Petitioner was unable to obtain Lawful Permanent Resident status. Petitioner's former attorney failed to provide notification of the denial.

The FBI official rap sheet, which was generated as a result of the Adjustment application, indicates several agency numbers, including A28 337 307, A76 806 533, A76 206 533.

The 1998 agency file contains reference to yet another agency number, to wit, A23 718 644. This Agency number comes back to an Ivette Trevizo-Fria with a date of birth of April 6, 1971.

Unaware of the decision denying her adjustment application, on Friday, April 23, 2004, Petitioner appeared at the Kansas City, MO District Office for USCIS in an effort to renew her work authorization. She was arrested and detained at that time. On Monday, April 26, 2004, Petitioner

was advised that the government was reinstating the March 2, 1998 order and that Petitioner would not be eligible for release.

Counsel for Petitioner simultaneously filed a Writ of Habeas Corpus in the Western District of Missouri, challenging the March 2, 1998 order, and a Petition for Review in the 8th Circuit Court of Appeals challenging the act of reinstating the prior order. The District Court issued a stay of removal and Petitioner was released from USICE custody.

On February 15, 2006, the Petition for Review, following briefing and oral argument was denied by the Court of Appeals. A Motion for Rehearing and Rehearing Enbanc was filed. Both Motions were denied on April 25, 2006.

The Court of Appeals, in their decision to deny the Petition for Review, also ordered the District Court to transfer the Habeas case to them pursuant to Real ID, 2005. Petitioner had objected to a Motion to Transfer the Habeas to the Circuit Court, which had been filed by the Respondent. However the District Court transferred the case pursuant to the Circuit Court Mandate.

On May 1, 2006, the Court of Appeals, without briefing or argument, dismissed the transferred Habeas case.

It is for the ability to have a hearing and resolve the factual disputes that Petitioner asks this Court to grant certiorari.

ARGUMENT FOR THE WRIT

Review is appropriate because the Appeals Court's decision is contrary to 8 USC §1252 (e)(2).

It is undisputed that prior to the enactment of the Real ID Act of 2005, the District Court had jurisdiction to review the issues raised in the Habeas matter. The Court of Appeals incorrectly determined that the District Court lacked jurisdiction subject to the passage of REAL ID. Given the

nature of this current case and the factual issues at stake, it is clear that Real ID does not divest the District Court of jurisdiction, instead it specifically grants the District Court Habeas Corpus Jurisdiction in the statue.

On May 11, 2005, Congress signed into law the Real ID Act (RIDA). RIDA, once passed into law, modified the text of 8 USC §1252. This section of law outlined the jurisdiction of the Courts to review orders of removal. Thus, any changes to this section of law, could arguably, affect the method by which such matters could obtain judicial review. To that end, many orders of removal do now have limited judicial review solely in the Courts of Appeals; Petitioner's Order, however, is not one of them. There are a number of cases from a number of jurisdictions that have transferred cases to the Circuit Courts. Since those cases involve final orders of removal under section 240 of the Act, and not, as in this case, an order under section 235, they were properly transferred to the Courts of Appeal.

The language of RIDA directs that the "exclusive means of review" for orders of removal lies with the Circuit Courts; however, the language of the statute does not encompass removal orders issued under USC 1225 (b)(1):

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code [28 USCS § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28 USCS §§ 1361 and 1651], a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, **except as provided in subsection (e).** For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to

> review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, United States Code [28 USCS § 2241], or any other habeas corpus provision, sections 1361 and 1651 of such title [28 USCS §§ 1361 and 1651], and review pursuant to any other provision of law (statutory or nonstatutory).

8 USC §1252 (a)(5)(emphasis added).

Therefore, while RIDA did vest review of orders of removal with the Circuit Court, it created an exception for orders of removal issued under section 235(b)(1), the same section under which Petitioner's order was initially issued. This exception is located at 8 USC §1252(e):

> (2) Habeas corpus proceedings. Judicial review of any determination made under section 235(b)(1) [8 USCS § 1225(b)(1)] is available in habeas corpus proceedings, but shall be limited to determinations of-- (A) whether the petitioner is an alien, (B) **whether the petitioner was ordered removed under such section**, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207 [8 USCS § 1157], or has been granted asylum under section 208 [8 USCS § 1158], such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C) [8 USCS § 1225(b)(1)(C)]

(Emphasis added)

The Circuit Court erroneously held that while Petitioner was removed pursuant to §1225(b)(1), she was not eligible for District Court Habeas review because the original order had been reinstated pursuant to §1231(a)(5). While the language of §1231 states that a reinstated removal order "is not subject to being reopened or reviewed" the Court held that they held sole jurisdiction to review the reinstatement through §106 (c) of REAL ID. They reviewed only the reinstatement not the underlying order. This holding creates an inherent Constitutional conflict where Petitioner is left subject to a removal order that is unreviewable.

This conflict arises because the original order issued pursuant to 8 USC §1225(b)(1) mandates that the alien shall be "removed from the United States without further hearing or review." This vests within an agent of U.S. Immigration and Customs Enforcement (USICE) or U.S. Customs and Border Protection (USCBP) the ability to immediately remove an alien encountered at the border without judicial review.

Following REAL ID the only judicial review available for an order of removal under §1225(b)(1) is Habeas Corpus. However, Habeas Corpus review is not available for those persons outside the United States who have been deported by USICE. The language of the statute 28 USC 2241 requires that the person be in "custody under or by color of the authority of the United States." (28 USC 2241(c)(1)) *See also Miranda v. Reno*, 238 F.3d 1156 (9th Cir. 2001) (holding that a person who has been deported is not longer in "custody for Habeas jurisdiction).

Because of this procedural and statutory framework, an alien who is immediately removed has no ability to access Habeas review in the District Courts. Thus, the only factual scenario that would allow for, or require, Habeas review of an order pursuant to 1225(b)(1), is following an alien's illegal re-entry into the United States. If an alien legally entered the United States they would have had to obtain a

waiver of the prior removal order or have waited the statutory period of inadmissibility (10 years) to pass before reapplying for entry. In either legal entry scenario, the effect of the prior removal would have been mitigated and Habeas review would be unnecessary.

Further the language of §1252(e)(2)(B) (whether the petitioner was ordered removed under such section) is plain as to whom it applies. The right of Habeas review through this statute would apply to those persons where in USICE is reinstating a prior §1225(b)(1) order, and the alien asserts they are not the individual named in the order. The words of §1252(e)(2)(B); *was ordered removed*, indicate that Congress contemplated this applying those persons looking backward at an order which had already been issued.

Arguably, the most common way that one would discover such an order is in a reinstatement process. Thus, a plain reading of the statute makes it clear that even in a reinstatement process, §1252(e)(2) grants Habeas review of the prior order.

The Eighth Circuit ignored the plain language of §1252(e)(2), which creates an exception for habeas review specifically for orders of removal entered through §1225(b)(1). They instead held that Petitioner was not ordered removed pursuant to §1225(b)(1) but rather subjected to reinstatement pursuant to 8 USC §1231(a)(5). The Court further asserted that while §1231 states that the prior removal order is "not subject to being reopened or reviewed" the only review is of the reinstatement through 106(c) of REAL ID. Thus, through the Circuit Court's holding, Petitioner is subject to a removal order that is wholly unreviewable.

This Court recognized this conundrum with it's holding in *INS v. St. Cyr*, 533 U.S. 289, 300 (U.S. 2001) stating:

> A construction of the amendments at issue that would entirely preclude review of a

> pure question of law by any court would give rise to substantial constitutional questions. Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Because of that Clause, some "judicial intervention in deportation cases" is unquestionably "required by the Constitution." Citing *Heikkila v. Barber*, 345 U.S. 229, 235, 97 L. Ed. 972, 73 S. Ct. 603 (1953).

This sentiment has been applied by other Circuit Courts. See *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002) and *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006)(which recognized that REAL ID did not strip Habeas Jurisdiction for those removal orders issued pursuant to §1225(b)(1) *Id* at 511)

The holding of the Fifth Circuit in *Ramirez-Molina* appears to be directly contrary to that of the Eighth Circuit in the instant matter creating a split in the Circuit Courts.

While many Circuit Courts have held that a reinstated order becomes a "final order of removal" for the purpose of judicial review, (See *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 294-95 (5th Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 674 (6th Cir. 2001); *Lopez-Flores v. Dep't of Homeland Sec.*, 387 F.3d 773, 774 (8th Cir. 2004); *Castro-Cortez v. INS*, 239 F.3d 1037, 1043-44 (9th Cir. 2001); and *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3, 72 Fed. Appx. 764 (10th Cir. 2003) this theory abrogates the plain language of §1252(e)(2), which carves out an exception for those orders issued pursuant to §1225(b)(1). A plain reading of §1252 indicates that the Circuit Courts now have jurisdiction to

review all removal orders except those issued pursuant to §1225(b)(1).

Such a reading of §1252 makes logical sense. To challenge a §1225(b)(1) removal order an alien must either contest their alienage, whether they were the person ordered removed or that they were admitted for lawful permanent residence, a refugee or granted asylum. (8 USC §1252(e)(2)(A-C).

A proceeding to defend one of those assertions would require the gathering and presentation of evidence, for which the District Courts are best suited. Indeed, in the instant matter, while the matter was ongoing in the District Court, Petitioner had issued interrogatories and requests for production to USICE for records and documents relevant to the defense of her position. Discovery was incomplete at the time of transfer to the Circuit Court.

Petitioner has continually challenged the order issued on March 2, 1998 to Ivette Trevizo Frias and re-instated upon Petitioner on April 26, 2004. Petitioner has repeatedly stated that that order does not apply to her and that the government wrongfully reinstated the 1998 order against her. Such is the question contemplated in subsection §1252(e)(2)(B) and Petitioner's litigation before the District Court. The panel's mandate to transfer the case pending before the District Court, where identity was clearly an issue, was contrary to the plain language of the statute. This transfer divested Petitioner of her statutory right to review in a trial court where evidence can be sought, submitted and properly weighed. Such a decision violated Petitioner's Fifth Amendment rights to due process and a full and fair hearing. This Court should grant certiorari in order to resolve this improper statutory interpretation.

CONCLUSION

The petition for the writ of certiorari should be granted. The opinion of the Court of Appeals is contrary to the plain language of the statute. The opinion of the Court of Appeals conflicts with the holdings of other Circuits. This Court therefore should reverse the Court of Appeals. This Court should grant this petition to provide uniform guidance to the lower courts as to the application of the changes in USC §1252 as created by the Real ID Act of 2005.

Respectfully submitted,

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APPENDIX

I. United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2038

Myrna Gregoria Ochoa-Carrillo,	*	
	*	
Petitioner,	*	
	*	Petition for
v.	*	Writ of
	*	Habeas
Alberto Gonzales, Attorney	*	Corpus and
General of the United States	*	Stay of
of America,	*	Removal.
	*	
Respondent.	*	

Submitted: April 18, 2006
Filed: May 1, 2006

Before LOKEN, Chief Judge, GRUENDER and BENTON, Circuit Judges.

LOKEN, Chief Judge.

When the Bureau of Immigration and Customs Enforcement reinstated a prior order of removal pursuant to 8 U.S.C. § 1231(a)(5), Myrna Ochoa-Carrillo filed a petition for judicial review in this court and a petition for a writ of habeas corpus in the Western District of Missouri. We denied the petition for review and urged the district court to transfer the habeas petition to this court pursuant to Section 106(c) of the REAL ID Act of 2005, Pub. L. 109-13, Div. B, Tit. I. See Ochoa-Carrillo v. Gonzales, 437 F.3d 842, 846 n.5, 848 (8th Cir. 2006). Ochoa-Carrillo argues that the transfer was improper. We disagree and accordingly dismiss the habeas petition.

Section 106 was enacted to reduce overlapping judicial review and habeas corpus jurisdiction created by the decision in INS v. St. Cyr, 533 U.S. 289 (2001). See Grass v. Gonzales, 418 F.3d 876, 878 (8th Cir. 2005), cert. Denied, 2006 U.S. LEXIS 3133 (2006). Section 106 amended the Immigration and Nationality Act to provide that a "petition for review filed with an appropriate court of appeals shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, *except as provided in subsection (e)*." 8 U.S.C. § 1252(a)(5) (emphasis added). Subsection 1252(e)(2) authorizes limited habeas corpus review of expedited removal orders issued under 8 U.S.C. § 1225(b)(1). Ochoa-Carrillo's removal order was issued pursuant to § 1225(b)(1). Therefore, she argues, she is eligible for habeas review under § 1252(e)(2), and we erred in urging the district court to transfer her habeas petition to this court.

The flaw in this contention is that it improperly equates the initial removal order issued under § 1225(b)(1) with the order reinstating that removal order issued under § 1231(a)(5). Section 1231(a)(5) provides for an expedited reinstatement proceeding in which the "prior order of removal . . . is not subject to being reopened or reviewed."

This means that the limited habeas review of removal orders issued under § 1225(b)(1) that is authorized by § 1252(e)(2) may not be conducted in a § 1231(a)(5) reinstatement proceeding. That explains why § 1231 (a)(5) reinstatement proceedings were excluded from the § 1252(e)(2) exception. Thus, judicial review in the appropriate court of appeals is the "sole and exclusive" means to review a § 1231(a)(5) order reinstating a prior removal order, and § 106(c) of the REAL ID Act mandated the transfer of Ochoa-Carrillo's habeas petition to this court.

Section 106(c) provides that, when a habeas case is transferred, we "shall treat the transferred case as if it had been filed pursuant to a petition for review" under 8 U.S.C. § 1252. We have previously reviewed Ochoa-Carrillo's reinstatement order. Accordingly, this habeas petition must now be dismissed.

II. United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2038

Myrna Gregoria Ochoa-Carrillo,	*	
	*	
Petitioner,	*	
	*	Petition for
v.	*	Rehearing
	*	and for
Alberto Gonzales,	*	Rehearing
	*	En Banc
Respondent.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 25, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

III. United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2038_

Myrna Ochoa-Carrillo,	*	
	*	
Petitioner,	*	
	*	Petition for
v.	*	Review of
	*	an Order
	*	of the
Alberto Gonzales, Attorney	*	Department
General of the United States	*	of
of America,	*	Homeland
	*	Security
Respondent.	*	

Submitted: October 12, 2005
Filed: February 15, 2006

Before LOKEN, Chief Judge, GRUENDER and BENTON, Circuit Judges.

LOKEN, Chief Judge

Myrna Ochoa-Carrillo petitions for judicial review of an order of the Bureau of Immigration and Customs

Enforcement (BICE) reinstating a prior removal order.[1] The order was entered pursuant to § 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5),[2] and its implementing regulation, 8 C.F.R. § 241.8. Ochoa-Carrillo argues that BICE erred in determining that she is the alien named in the prior order and that the regulation violates the statute and her right to procedural due process. We have jurisdiction to review an order reinstating a prior order of removal. See 8 U.S.C. § 1252(b)(4)(A); Grass v. Gonzales, 418 F.3d 876, 879 (8th Cir. 2005). We conclude that the agency's identity determination is well supported in the administrative record. We reject Ochoa-Carrillo's statutory argument and conclude that she has failed to establish the prejudice necessary to support a procedural due process challenge. Accordingly, we deny the petition for review.

I. Background Facts.

In November 2001, Ochoa-Carrillo married an American citizen in Kansas City, Missouri. She applied for an adjustment of status to lawful permanent resident on INS Form I-485, representing that she had never been deported but had used a false social security number to obtain work. Immigration officials submitted the application, which included Ochoa-Carrillo's

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[1] The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service and transferred the authority to enter the order at issue to the Department of Homeland Security, which placed that authority in BICE. Thus, Attorney General Gonzales may not be the proper respondent, but the government has not raised the issue so we decline to consider it.

[2] The statute provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, and the alien shall be removed under the prior order at any time after the reentry."

fingerprints, to the FBI for a routine criminal check. The FBI reported that the applicant's fingerprints matched those of an alien named Ivette Trevizo-Frias who made a false claim of U.S. citizenship and was summarily removed under a removal order dated March 2, 1998.[3] In March 2004, the INS denied the I-485 application on the ground that Ochoa-Carrillo "made a false claim to United States citizenship on March 2, 1998, was subsequently removed from the United States as a result of that claim, and no waiver of this ground of inadmissibility is available." See 8 U.S.C. § 1182(a)(6)(C)(ii).

IV. Discussion.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), enacted significant changes to the statutory reinstatement and removal procedure. See Alvarez-Portillo v. Ashcroft, 280 F.3d 858, 862-63 (8th Cir. 2002), cert.denied, 537 U.S. 1111(2003). The statute does not prescribe the procedures to be followed in reinstating a prior removal order. Responding to legislative history reflecting Congress's intent to expedite the removal of those who illegally reenter, the Attorney General promulgated regulations adopting a summary reinstatement procedure. See 8 C.F.R. § 241.8; Lattab v. Ashcroft, 384 F.3d 8, 17-20 (1st Cir. 2004).[4]

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[3] The record also contains a February 1993 exclusion order entered after Ochoa-Carrillo entered the country by presenting a false resident alien identification card, and a Record of Deportation stating that she was apprehended and removed at a point of entry on March 10, 1998.

[4] As relevant here, the regulations provide:

§ 241.8 Reinstatement of removal orders.

(a) Applicability. An alien who illegally renters the United States after having been removed . . . shall be removed from the United States

A.

Ochoa-Carrillo first argues that the April 26, 2004 Notice of Reinstatement erred in *alleging* that she is subject to a prior order of removal. She asserts that the Notice was invalid because BICE did not ask the FBI for a fingerprint comparison until April 27, the day after its adverse determination, whereas the regulation provides that, in a disputed case, "verification of identity shall be accomplished

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by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. . . .

(2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed . . . . In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously . . . removed alien . . . and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted . . . .

(b) Notice. If an officer determines that an alien is subject to removal . . . he or she shall provide the alien with written notice of his or her determination [and] shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

by a comparison of fingerprints" and the summary reinstatement procedure may not be used "[I[n the absence of fingerprints," 8 C.F.R. § 241.8(a)(2). This assertion is legally unsound because the regulation does not state that the summary reinstatement procedure may not be *commenced* absent fingerprint evidence. More importantly, the assertion is factually wrong. The Notice was issued after the March 2004 denial of Ochoa-Carrillo's I-485 application, which in turn was based upon FBI fingerprint comparisons in 2002 that reported a match with the prints of Trevizo-Frias. Thus, BICE was fully justified in issuing a Notice of Reinstatement under§ 241.8.

Ochoa-Carrillo's appeal brief then attempts to catalog all the mistakes that FBI examiners might have made in comparing the fingerprints. Assuming this is a challenge to the agency's identity determination, rather than the Notice, there is no record support for these speculative contentions. Ochoa-Carrillo was entitled to contest identity. See 8 C.F.R. § 241.8(a)(2). The agency's reliance on a prior removal order identifying the removed alien by a different name raised an identity issue. But when served with the Notice on April 26, Ochoa-Carrillo did not make a written statement disputing the agency's determination. She apparently raised the identity issue orally because BICE submitted another fingerprint request to the FBI the next day. The FBI promptly reported another match with the prints of Trevizo-Frias, a report that gave the agency decision-maker no basis to reconsider his April 26 identity determination, as 8 C.F.R. § 241.8(b) expressly permits.

Ochoa-Carrillo made no further record on the identity issue. Instead, she filed an administrative motion to reopen the February 1993 exclusion proceedings on grounds other than mistaken identity; a petition for review to this court, which may only consider the administrative record; and a habeas petition to the district court, which had no jurisdiction

because judicial review lies exclusively in the court of appeals.[5] On this record, we must reject any challenge to the fingerprint evidence relied upon by BICE in making its identity determination. Thus, substantial evidence on the administrative record as a whole supports BICE's decision to reinstate the March 2, 1998 removal order and remove Ochoa-Carrillo as an illegal reentrant.

B.

Ochoa-Carrillo argues that BICE violated the Immigration and Nationality Act by entering the reinstatement order without the hearing before an immigration judge that must precede entry of an initial removal order. See 8 U.S.C. § 1229a(a)(1) and (b)(4). These hearing provisions apply broadly to removal proceedings: "Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." 8 U.S.C. § 1229a(a)(3). Because § 1231(a)(5) does not prescribe different procedures to be employed in reinstating a removal order, Ochoa-Carrillo contends that BICE must therefore comply with the § 1229a procedures. The argument is based upon the panel decision is now being reviewed by the Ninth Circuit en banc, Morales-Izquierdo v. Gonzales, 423 F.3d 1118 (9th Cir. 2005).

In Alvarez-Portillo, 280 F.3d at 866, in considering whether 8 U.S.C. § 1231(a)(5) had an impermissible retroactive effect, we commented:

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[5] See 8 U.S.C. § 1252(a)(5); Lopez v. Heinauer, 332 F.3d 507, 512 (8th Cir. 2003). Our decision in Lopez deprived the district court of jurisdiction at the time Ochoa-Carrillo filed her habeas petition. We have now afforded the judicial review to which she is entitled. Accordingly, the Western District of Missouri should now transfer the case to this under the REAL ID Act, Pub. L. 109-13, Div. B, Title I, § 106(c) (2005).

> The INS has construed [the statute] as mandating a more streamlined reinstatement procedure. Therefore, its implementing regulation provides the alien with notice and an opportunity to be heard but authorizes and immigration officer to make the required fact findings and enter a reinstatement order in summary fashion. 8 C.F.R. § 241.8. This is clearly a permissible interpretation of the statute that is entitled to substantial judicial deference.

Since that decision, we have upheld at least three reinstatement orders without reconsidering that comment. See Briones-Sanchez, 319 F.3d at 327; Lopez, 332 F.3d at 512; Flores v. Ashcroft, 354 F.3d 727, 730 (8th Cir. 2003). In Lattab, 384 F.3d at 17-20, the First Circuit considered the question in depth, concluding that the statute is ambiguous and agreeing with Alvarez-Portillo that 8 C.F.R. § 241.8 must be upheld as a reasonable interpretation of the statute. In United states v. Tilley, 144 Fed. Appx. 536, 540 (6th Cir. 2005), the Sixth Circuit also upheld the regulation, finding no ambiguity because imposing the procedural requirements of 8 U.S.C. § 1229a would be inconsistent with the requirements of § 1231(a)(5). By either analysis, we conclude the answer is clear – 8 C.F.R. § 241.8 is a valid interpretation of the Immigration and Nationality Act.

C.

Ochoa-Carrillo further argues that the summary reinstatement procedures mandated by 8 C.F.R. § 241.8 violate the due process rights of aliens who wish to contest reinstatement determinations. Although resident aliens have a right to due process in immigration proceedings, "[t]he constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances." Landon v. Plasencia, 459 U.S. 21, 34 (1982); see Mathews v. Eldridge,

424 U.S. 319 (1976). "[T]o succeed on a due process claim, an alien must prove that he was actually prejudiced by the lack of process afforded to him." Briones-Sanchez, 319 F.3d at 327.

1. The statute provides that an alien shall be removed by reinstating a prior removal order upon a showing that the alien was subject to a prior removal order and illegally reentered the United States. We have previously observed that "the streamlined notice and opportunity to be heard afforded illegal reentrants under § 241.8 seems quite appropriate when the only issues to be determined are those establishing the agency's right to proceed under [8 U.S.C. § 123(a)(5)] – the alien's identity, the existence of a prior removal order, and whether the alien has unlawfully reentered." Alvarez-Portillo, 280 F.3d at 867. In three cases, we rejected procedural due process challenges to 8 C.F.R. § 241.8 because the alien did not contest these findings and therefore failed to show prejudice. Flores, 354 F.3d at 730; lopez, 332 F.3d at 512; Briones-Sanchez 319 F.3d at 327. Ochoa-Carrillo argues that this case is distinguishable because she contested identity, one of the determinations the immigration officer must make in entering a reinstatement order.

The regulation provides that, in disputed cases, "verification of identity shall be accomplished by a comparison of fingerprints." See § 241.8(a)(2). Fingerprint identification often involves a comparison of latent prints, impressions taken from the surface of an object such as a crime scene weapon, and inked prints, those obtained when a person rolls inked fingertips on a piece of paper. Fingerprint identification involving latent prints has been contested in many cases. See Weinstein & Berger, Weinstein's Federal Evidence § 702.06 (2005). On the other hand, 8 C.F.R. § 241.8 prescribes a comparison of two sets of inked fingerprints taken by government officials for immigration or

other regulatory purposes. Inked prints are of higher quality than latent prints, and comparisons of inked prints are more reliable. See United States v. Mitchell, 365 F.3d 215, 243 (3rd Cir.), cert. Denied. 543 U.S. 974 (2004) ("It is significantly easier to match one clean full-rolled [inked] print to another than it is to match a somewhat distorted latent fragment to a full-rolled print."). Thus, it is reasonable for the agency to employ a summary procedure when its identity determination is based upon the comparison of inked fingerprints in its records. Of course, nothing in the regulation bars an alien from requesting copies of the agency's fingerprint evidence and subjecting that evidence to examination by an independent expert. But in the absence of such a fact-based challenge, the due process argument fails for lack of a showing of prejudice.

2. Ochoa-Carrillo argues that the summary reinstatement

proceeding provides no "meaningful opportunity" to review the alien's files and respond. Here, Ochoa-Carrillo, represented by counsel, was presented with a written Notice and given an opportunity to make a written statement, which she declined. The regulations provide that the alien may examine relevant records, see C.F.R. §§ 103.2(b)(16)(i), 103.10,1292.4(b). The entry of appearance form signed by Ochoa-Carrillo's attorney noted the "availability of records" for review. This contention is without merit.

3. Ochoa-Carrillo next argues that she lacked adequate opportunity to create an adequate record for judicial review. Again, the record belies this claim. On April 26, she orally contested identity. The next day, BICE requested another FBI fingerprint comparison. The FBI again reported that the fingerprints of Ochoa-Carrillo and Trevizo-Frias matched. The record contains no written statement or motion by Ochoa-Carrillo requesting additional process and explaining why it would produce a different result. In other words,

though given a meaningful opportunity to raise and contest the identity issue, Ochoa-Carrillo submitted nothing in the nature of an offer of proof demonstrating that, with more process, she would prevail in the face of the substantial identity evidence furnished to BICE by the FBI. This procedural due process challenge fails because no prejudice has been shown.

4. Ochoa-Carrillo argues that the regulations fail to provide aliens with the advice and assistance of counsel. She was represented by counsel at all relevant times. No prejudice has been shown.

5. Ochoa-Carrillo argues that placing the reinstatement decision in the hands of an immigration officer, rather than an immigration judge, results in unacceptably biased decision-making. The Supreme Court long ago characterized this due process argument as "without substance." Marcello v. Bonds, 349 U.S. 302, 311 (1955); accord Gomez-Chavez v. Perryman, 308 F.3d 796, 802 (7th Cir. 2002), cert. denied, 540 U.S. 811 (2003); United States v. Garcia-Martinez, 228 F.3d 956, 960-61 (9th Cir. 2000), cert. denied, 531 U.S. 1179 (2001); United States v. Benitez-Villafuerte, 186 F.3d 651, 659-60 (5th Cir. 1999), cert. denied, 528 U.S. 1097 (2000).

6. Finally, citing no relevant authority, Ochoa-Carrillo argues that § 241.8 violates due process because it fails to require that the alien be given notice of the right to judicial review. Ochoa-Carrillo filed a timely petition for judicial review to this court. Again, no prejudice has been shown.

We deny the petition for review.

IV. STATUES INVOLVED

8 USC 1225(b)(1) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general if an immigration officer determine that an alien (other than an alien described in subparagraph (F)) who is inadmissible under section 1182 (a)(6)(C) or 1182 (a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 USC 1231(a)(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 USC 1252(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus Proceedings

Judicial review of any determination mad under section 1225 (b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section ``58 of this title, such status not having been terminated, and is entitled to such further inquire as prescribed by the Attorney General pursuant to section 1225(b)(1)(C)of this title.